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No. 94-466

In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

vs.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Import-Export Clause prohibits the imposition of *ad valorem* property taxes on imported goods merely because they are in transit within their state of destination?

2. Whether the Commerce Clause prohibits the imposition of *ad valorem* property taxes on imported goods merely because they are in transit within their state of destination?

LIST OF PARTIES

Petitioners:

Respondents adopt Petitioner's listing pursuant to this Court's Rule 29.1.

Respondents:

Respondent Nueces County Appraisal District is a political subdivision of the State of Texas. Respondent Appraisal Review Board of the Nueces County Appraisal District is an appointed board responsible for determining administrative appeals related to the District's actions.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Diamond Shamrock Refining and Marketing Company.

OPINIONS BELOW

The "Opinions Below" section of the Petition for Writ of Certiorari accurately summarizes the lower court proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article I, § 10, cl. 2 of the United States Constitution provides as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

STATEMENT OF THE CASE

This case presents another instance of a taxpayer seeking to avoid the payment of just taxes by trying to cloak itself within the protections afforded to interstate and international commerce by the Import-Export Clause and the Commerce Clause of the United States Constitution.

This cause arose under the provisions of the Texas Property Tax Code (hereinafter referred to as the Tax Code or the Code).[1] The Respondents are the Nueces County Appraisal District, which has the responsibility under the provisions of the Tax Code for the development of appraisal rolls containing a description and valuation of all properties within the District's boundaries subject to property taxation, and the Appraisal Review Board of the Nueces County Appraisal District which is, under the provisions of Chapter 41, Tax Code, responsible for determining protests filed by property owners related to the appraisal of their property. Petitioner brought this cause as a petition for review under the provisions of Chapter 42 of the Code. Petitioner sought judicial review of the action of the Respondents in determining that certain crude oil owned by Petitioner and located within the Respondents' boundaries on January 1 of 1988, 1989 and 1990 was taxable.

Petitioner imports crude oil which originates from foreign sources and is transported by ships to the Harbor Island storage facility owned by American Petrofina and located within the Respondents' boundaries (App. 57a-58a).[2] From Nueces County the oil is transported by pipeline to its ultimate destination which is Petitioner's refinery in Three Rivers, Texas (App. 58a).

There were 323,019 barrels of the crude oil present in the Harbor Island facility on January 1, 1988. The longest any of this oil spent in that facility was 12 days. There were 658,968 barrels of the crude oil present in the Harbor Island facility on January 1, 1989. The longest any of this oil spent in that facility was 25.3 days. There were 408,667 barrels of the crude oil present in the Harbor Island facility on January 1, 1990. The longest any of this oil spent in that facility was 18.1 days (App. 58a).

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1. Title 1, Tex. Tax Code Ann. (West Supp. 1994).

2. All Appendix references are to the Appendix attached to the Petition.

While the disputed property is the crude oil that was present at Harbor Island on January 1 of 1988, 1989 and 1990, crude oil owned by the Petitioner was continuously present at the Harbor Island facility during the years 1987 through 1990 (App. 58a).

None of Petitioner's crude oil was pumped or sold outside the State of Texas (App. 59a). While the crude oil was located within Respondents' boundaries it was provided with governmental services (App. 59a).

The Petition, on Page 3, asserts several facts that are not reflected in the record of this cause, such as "The tankers used to import crude oil into this country have massive cargo holds, on the order of magnitude of one or two million barrels. Pipelines such as American Petrofina's simply do not have the capacity to transport such volumes of oil all at once." While Respondents do not contest these facts, they directly dispute the conclusion that Petitioner draws from them that "As a consequence, unlike domestic crude oil, which is transported to the refinery as it is pumped out of the ground, imported crude oil must be stored temporarily at its port of entry until it can be pumped to the refinery." This statement is not only unsupported by the evidence in the record of this cause, it is just plain wrong. Domestic crude oil is regularly gathered into tank farms before being shipped by pipelines to a refinery. *See Exxon Corp. v. San Patricio County Appraisal District,* 822 S.W. 2d 269 (Tex. App. — Corpus Christi 1991, *writ denied*), involving domestic oil. Petitioner's statement that there is some significant difference in the method of transporting domestic versus foreign crude oil is incorrect. Any barrel of crude oil located in tankage within Texas is for all practical purposes indistinguishable from any other barrel. All are destined to be refined and both domestic and foreign crude oil often flow through the exact same tank farms and pipelines.

The cause was tried before the court, without a jury, on

stipulated facts on April 11, 1991. Judgment for Diamond Shamrock was entered on April 25, 1991 (App. 52a-55a). The Corpus Christi Court of Appeals, sitting *en banc*, reversed the trial court's judgment and rendered judgment that the property was taxable in a 4-3 decision (App. 14a-41a). The majority found that because the taxes in question did not discriminate against foreign commerce on their face and that because the oil's destination was within the State of Texas, the taxes did not, and could not, offend any of the purposes of the Import-Export Clause identified by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (App. 16a-20a). The majority also declared that it was irrelevant whether the goods were in transit through Nueces County at the time they were appraised. Although the majority recognized that the fact that oil was in transit at the time of appraisal would have been relevant under traditional Import-Export Clause analysis, in its estimination, after *Michelin* "the concept of 'in transit' loses any rational meaning" independent of the purposes of the Clause. Accordingly, the majority asserted that once those purposes are satisfied, "the taxability of the property becomes a matter for the state." (App. 20a). For similar reasons, the majority rejected Petitioner's Commerce Clause challenge. One judge concurred separately.

Three judges dissented. The dissent found no basis for restricting the application of the in-transit rule of the Import-Export Clause and the Commerce Clause to goods that have not yet reached their state of destination. In focusing on whether goods are in transit, they observed, this Court's concern has not been where goods come to rest but rather whether they are in the midst of a commercial journey that originated outside the state in which they were taxed (App. 28a).

On review the Texas Supreme Court affirmed. That court held that the Import-Export Clause was not violated by the taxes imposed upon Petitioner's oil. It did so even though it

acknowledged that the oil was " 'in transit' while in Nueces County." (App. 6a). The Texas Supreme Court also acknowledged that in *Michelin* this Court stated that the Import-Export Clause prohibits " 'the assessment of even non-discriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.' " (App. 5a [quoting *Michelin,* 423 U.S. at 290]). Nevertheless, the state court upheld the taxes assessed by Nueces County on the ground that the in-transit exception announced in *Michelin* did not apply to goods that enter the country through their state of destination.

The Texas Supreme Court reached this conclusion on the basis of its reading of the purposes of the Import-Export Clause. According to the Texas court, one purpose of the Clause was to prevent states with ports of entry " 'from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.' " (App. 4a [quoting *Michelin,* 423 U.S. at 285-86]). The taxes imposed upon Petitioner did not, in the Court's view, pose such a threat because "the oil in question here entered *only* the State of Texas and . . . never left Texas in its crude oil form." (App. 6a [emphasis in original]). Thus, according to the Texas court, when read in context, "the *Michelin* Court's qualification clearly applies only to goods in transit through the state *to or from another state* and not to goods merely in transit within the only state the goods ever enter." (App. 6a [emphasis in original]).

The Texas Supreme Court also rejected Petitioner's Commerce Clause challenge, finding that the oil in dispute, though technically in transit through Nueces County, (1) was part of a continuous presence of a large quantity of Petitioner's oil in the County and (2) that the oil received governmental services while in the County; and, therefore, had a sufficient nexus with the County to justify taxation under the Commerce Clause (App. 10a-12a). The court noted many decisions of this Court invalidating state and

local taxation of goods in transit, but distinguished them on the ground that they involved not "foreign goods 'in transit' through only one state, which remain in that state," but "goods 'in transit' through one State on the way to or from another State or on the way to a foreign country." (App. 9a-10a nn. 6-7 [citations omitted]). The Texas court also asserted that after this Court's decision in *D.H. Holmes Co. v. McNamara,* 486 U.S. 24 (1988), "whether Diamond Shamrock's 'in transit' argument has any remaining validity under the modern Commerce Clause analysis is questionable." (App. 10a n.7).

REASONS FOR DENYING THE WRIT

The decision below was limited to the narrow facts of this case[3] and on the basis of those facts it is clear that tax imposed on Petitioner's property violated none of the purposes of the Import-Export Clause or the Commerce Clause of the United States Constitution.

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3. The Texas Supreme Court limited its holding as follows:

> Under these facts, we do not resolve a number of significant questions. For instance, we do not decide whether oil passing through Texas on its way to a foreign country or to another State is taxable under the Import-Export Clause or the Commerce Clause. Nor do we decide whether oil arriving in Texas from another State is taxable. Rather, the only question presented is whether oil that enters Texas from a foreign country and reaches its ultimate destination here may, under the United States Constitution, be taxed in a particular Texas county, despite the fact that it is still "in transit" while there.

App. 3a.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OF THE FIFTH CIRCUIT UNDER THE IMPORT-EXPORT CLAUSE.

A. The Decision Below Is Consistent With The Decisions Of This Court Under The Import-Export Clause.

The Import-Export Clause is Article I, § 10, cl. 2 of the United States Constitution and reads as follows:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

Petitioner's position, simply stated, is that the oil cannot be taxed because it is still in movement between its point of origin (foreign) and its final destination (Three Rivers, Texas). Respondents, on the other hand, would urge that the real issue is not whether the oil is in movement between its origin and its destination but whether it is "in transit" as that term has been defined by this Court in the context of the immunity from taxation afforded by the Import-Export Clause.

What Petitioner seeks to do is harken back to the traditional analysis used by this Court prior to abandoning that analysis in *Michelin Tire Corp. v. Wages, supra.*

While it is true that even this Court misunderstood for one hundred years the intentions of the Framers when they incorporated the Import-Export Clause into the United States Constitution [*see Low v. Austin*, 80 U.S. 29 (1872)], that misunderstanding was remedied when the Court handed down its opinion in *Michelin*. In that case, this Court went into great detail in discussing the real reasons for the inclusion of the Import-Export Clause in the United States Constitution. Those reasons were summarized by this Court as follows:

> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.

At 285-286.

This Court then proceeded into a detailed analysis of the first two reasons for the Import-Export Clause and indicated why non-discriminatory property taxation would in no way conflict with the

first two purposes of the Clause (at 286-288). The only issue in the instant cause is whether the taxes in question conflict with the third purpose of the Clause.

Since Petitioner's claim for immunity from taxation is based solely on the fact that the imported oil has not reached its final destination, the refinery in Three Rivers, Texas, this Court's holding in *Michelin* with regard to the third purpose of the Import-Export Clause is of paramount importance to this cause. In that regard this Court held as follows:

> Finally, nondiscriminatory ad volorem property taxes do not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation directed solely at imported goods.
>
> * * *
>
> To be sure, allowance of nondiscriminatory ad volorem property taxation may increase the cost of goods purchased by "inland" consumers. But as already noted, such taxation is the quid pro quo for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods. An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation

> of certain States that enabled them to single out goods destined for other States. *In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.* A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.

At 289-290. (Emphasis added).

With respect to Petitioner's property located within the Respondents' boundaries, it is stipulated that it receives services from local governments (App. 59a). It is also stipulated that property of this type owned by Petitioner is continuously present within the Respondents' boundaries (App. 58a). It is stipulated that had the oil in question originated in Texas it would be taxable (App. 62a). Finally, it is stipulated that none of the oil is destined to a location outside of Texas (App. 59a). With these stipulations in mind, it is easy to see that what Petitioner seeks is not protection from the evils that the Import-Export Clause was designed to prevent but rather preferential treatment not available to other similarly situated taxpayers.

Respondents would urge that the third purpose of the Clause was to serve as a shield to inland states and their citizens and was never intended to protect importers from bearing their fair share of the cost of government. In the instant cause, the Respondents would ask Petitioner which inland state and its citizens are being denied their shield? The answer obviously is — none.

Petitioner's oil is not "merely in transit through" Texas, but rather it is continuously present, receiving governmental services, and will be consumed within the State. What Petitioner seeks to do is transform the shield designed to protect others into a sword to be used to protect its private interests. Petitioner's property is continuously present within Respondents' boundaries and receives governmental services there but Petitioner seeks to use this sword to hold the State of Texas and its political subdivisions at bay when compensation for those services is sought. What Petitioner seeks is an exemption for up to seventy-five percent (75%)[4] of the oil it owns in Texas, and intends to use in Texas, on the basis of the provisions of the Import-Export Clause when the protections meant to be offered by that Clause are in no way offended by the tax.

Petitioner justifies this position by citing cases which are easily distinguished on their facts or their era.

What the Supreme Court accomplished in *Michelin,* though a dramatic shift with regard to the taxation of imports, was but one of a continuing series of steps toward a more rational review of state taxation as it relates to the Import-Export Clause.

Shortly after *Michelin,* this Court went one step further and allowed a tax upon gross proceeds derived from foreign commerce, as distinguished from interstate commerce. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978). In this case too the Court overruled prior decisions which had held against such taxes. *Puget Sound Stevedoring Co. v. State Tax Commission,* 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947).

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4. There were 658,958 barrels in Respondents' jurisdiction on January 1, 1989 (App. 58a) versus 200,000 barrels at Three Rivers, Texas (App. 62a).

In the case of *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina,* 479 U.S. 130 (1986), this Court went further and held that imported tobacco destined for domestic use but stored for up to two years in customs-bonded warehouses was subject to property taxation. This decision serves to clarify the *Michelin* holding with respect to imported goods which had reached their state of destination.

In upholding the property taxes in question this Court cited its earlier opinion in *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984) (*Hooven II*) to explain the change in direction undertaken in *Michelin.*

> The Court has stated that its decision in *Michelin Tire Corp. v. Wages,* "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause." (Cites omitted)
>
> We explained this approach, and its distinction from the earlier analysis, in *Limbach:*
>
> *To repeat: we think it clear that this Court in Michelin specifically abandoned the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation that fell on imports. Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. *The new focus is not on whether the goods have lost their status as imports but is, instead, on whether the tax sought to be imposed is an "Impost or Duty."* [at 153 (Emphasis added)].

This Court then proceeded to make five points in favor of the tax. *First,* the North Carolina tax did not "interfere with the Federal Government's regulation of foreign commerce, for, as we have seen, it falls on imported and domestic goods alike and does not single out imported goods for unfavorable treatment." (at 153). The same is true in the instant cause. *Second,* the tax did not impede the collection of customs duties (at 151). The same is true in the instant cause. *Third,* "the property tax is nothing more than a means by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth." (at 154). The same is true in the instant cause. *Fourth,* "if imposition of tax happens to have the incidental effect of discouraging some importation of foreign goods, prohibiting this result is not a function of the Import-Export Clause." *Fifth* and, "finally, in light of the services provided in exchange for this tax, it hardly constitutes the kind of exaction by the seaboard States on goods destined for inland States that the Framers sought to prevent by the Clause. A failure to assess the tax would shift the tax burden from Reynolds and the ultimate consumers of its tobacco products to the local taxpayers of North Carolina — a result completely at odds with *Michelin.* Accordingly, we conclude that the application of the tax to Reynolds' imported tobacco does not violate the Import-Export Clause." Cites omitted (at 154).

Just as in the instant cause Petitioner seeks immunity from taxation because the property is "in transit," so did the company in *R.J. Reynolds* and the Court wasted little time in denying the claim. This Court's reasoning is as follows:

> This Court has observed that in *Michelin* it limited its holding to the imported goods " 'no longer in transit.' " *Washington Revenue Dept.,* 435 U.S., at 755, 98 S. Ct., at 1401 (quoting *Michelin,* 423 U.S., at 302, 96 S. Ct., at 548). Reynolds contends that, because goods stored

> in customs-bonded warehouses are by definition "in transit," this cause does not fall within the scope of *Michelin's* holding.[24] This reasoning, however, is unpersuasive. *The imported tobacco here, we repeat, has nothing transitory about it: it has reached its State — indeed, its county — of destination and only the payment of the customs duty, after the appropriate aging, separates it from entrance into the domestic market.*

At 154. (Footnote omitted, emphasis added).

As indicated by this Court, the property in *Reynolds* had "*reached its State . . . of destination*" and very little except time prevented it from being used for its ultimate purpose. What seemed most significant to this Court, however, was the non-discriminatory and "quid pro quo" nature of the tax in question. The fact that the property might still be, technically, in transit did not outweigh the fact that the tax in question was fairly related to the services and protections provided by the state.

Clearly, even a non-discriminatory property tax on imported goods still in transit should not stand if it is not fairly related to the services provided by the taxing entity. However, where a fair relationship exists, the "in transit" status of the property should not require immunity from taxation. To understand the different situations which would dictate opposite results one must look to the nature of property taxation itself.

In every state, the tax is levied on the basis of the value and location of property on a particular day — generally referred to as the "assessment date." Although the tax is based on the status of property on that date, it is used to pay for governmental services provided throughout the year.

Levying a tax on an isolated shipment of imported goods which are, more or less by accident, present in the state on the assessment date but destined for immediate transhipment to another state would be demanding payment of a year's worth of governmental services when in fact those services are only going to be provided for a few days or perhaps even for a few hours. It would be impossible to justify imposition of even a non-discriminatory tax under such circumstances. The services provided to the property would not be fairly related to the tax imposed. As a result of modern transportation capabilities, a single shipment might easily be present in several jurisdictions on the same day, and thus exposed to multiple taxation. Such a tax would indeed be the very type of transit fee which the Court in *Michelin* condemned.

On the other hand, in the instant cause of action the property was present within the Respondents' boundaries not by an accidental coincidence on the assessment date, but rather as part of a continuous flow of identical property owned by Petitioner. The tax, although based on the volume and value of the property present within the Respondents' jurisdiction on January 1 of the years in dispute, is payment for the services which were provided throughout the year to the same or identical properties owned by Petitioner.

The Respondents would urge that under these circumstances, even if the oil were destined for a refinery in another state, the tax in question would not be in the nature of the "transit fees" condemned by the *Michelin* Court but rather would be the "quid pro quo for benefits actually conferred" which the Court specifically endorsed. To not allow such taxation would require local taxpayers to subsidize the services used by Petitioner which the *Michelin* Court specifically condemned.

B. The Decision Below Is Consistent With The Decision Of The Fifth Circuit.

On this point the Respondents would specifically address the one case cited by Petitioner — *Louisiana Land & Exploration Company v. Pilot Petroleum Corporation,* 900 F.2d 816 (5th Cir. 1990), *cert. denied,* 498 U.S. 897 (1990). A quick reading of that case would indicate some support for Petitioner's position in this cause. After a closer reading, however, the case is easily distinguished from the instant cause.

The distinguishing factor is that the tax in question was being levied on fuel immediately destined for a foreign nation. The federal courts have been particularly sensitive to taxes, even non-discriminatory taxes, where the tax will be borne by a foreign entity. *See Japan Line Ltd. v. Los Angeles County,* 441 U.S. 434. In the instant cause there is no conceivable way that the tax in question could have any impact on this nation's relations with another nation. Goods being exported clearly stand on a different and more sensitive footing than goods which have been imported. Even the federal government is barred from laying a duty on exports. United States Constitution, Article I, § 9, cl. 5.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT UNDER THE COMMERCE CLAUSE.

What this Court accomplished in *Michelin,* though a dramatic shift with regard to the taxation of imports, was but one of a continuing series of steps toward a more rational review of state taxation as it relates to both the Import-Export Clause and Commerce Clause of the United States Constitution. Those steps began in 1891 with the Court's holding in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891).

In that case this Court moved away from the "home port" or domicile of the owner doctrine as it related to the taxation of instrumentalities of interstate commerce. Prior to *Pullman's* the vehicles, vessels, and other equipment used to transport goods in interstate commerce were taxable only at their domicile or "home port" regardless of the degree of the contact those properties may have had with other states. The Court in *Pullman's* moved to the more rational view of "apportioned" taxation between the states where the property operated to allow taxation that reasonably related to the services and protections provided the property by those states. The apportionment doctrine has since been regularly refined and restated. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 (1954).

In the case of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977),[5] this Court held that states have the power to tax gross receipts derived from transporting goods in exclusively interstate commerce; in other words, to tax the business of interstate commerce. This decision ended decades of indecision on the part of the court about whether the states could levy a direct tax on those engaged in interstate commerce. Prior to *Complete Auto* this Court had allowed indirect taxation but not direct taxation of interstate commerce. The result was that the states were subjected to a series of cases more concerned with style than substance. *See Spector Motor Service, Inc. v. O'Conner*, 340 U.S. 602 (1951), and *Freeman v. Hewit*, 329 U.S. 249 (1946), both of which were overruled by *Complete Auto.*

Although it is the Respondents' position that no interstate commerce issues are present in this case, perhaps their position can

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5. Although *Complete Auto* is clearly the most significant decision this Court has rendered with respect to the relationship of the Commerce Clause and state taxation, it is noteworthy that it goes unmentioned in the Petition.

best be explained by responding to the arguments that the Petitioner made before the court below that the tax in question did not meet the test set forth in *Complete Auto, supra.*

That test provides that a tax will be upheld against a Commerce Clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Petitioner argued that there was no substantial nexus in this cause. This argument ignored the facts of this case. Petitioner is authorized to do business in Texas (App. 62a). Oil such as that involved in this cause was continuously present within the Respondents' boundaries (App. 58a). The oil was destined to be refined within Texas (App. 58a). The oil received governmental services within Respondents' boundaries (App. 59a). Finally, the oil had no contact with any other State (App. 59a). This is not a case where the tax arose as a result of purely incidental contact with Texas.

Petitioner also argued that there was no fair apportionment in the instant cause. Respondents asked the obvious question — apportionment between Texas and what other State? The apportionment test is one designed to avoid multiple taxation of the same property or activity. The idea of apportionment arose originally with respect to the taxation of instrumentalities of interstate commerce. *See Ott v. Mississippi Valley Barge Line Co., supra.* The purpose of apportionment "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet,* 488 U.S. 252, 261 (1989). In the case of instrumentalities of commerce, taxation has been upheld where the tax is levied on a portion of the fleet's value which fairly represents its presence or use within the state. In a case such as the instant cause where the property had no contact with any other state, there was no

possibility of multiple taxation and therefore no apportionment requirement.

Petitioner also argued that the tax was not fairly related to the property's contact with the Respondents' jurisdiction. If Petitioner had wished to seriously argue that the tax was not fairly related to the services provided, it failed to bring forth sufficient evidence to carry its burden of proof. It could, for example, have attempted to show that the amounts of oil present on January 1 of each year were anomalies and that on the average it had only a few thousand barrels in Nueces County rather than hundreds of thousands. To do this Petitioner could have protested the volume or value of the oil being appraised, but it did not.

Finally, with respect to the discrimination test established by *Complete Auto,* it is clear that the property tax involved here is by its nature non-discriminatory. That is further buttressed by the stipulations between the parties (1) that if the crude oil had originated in Texas it would be subject to the tax, and (2) that Respondents attempt to appraise for taxation all other crude oil located within their boundaries on January 1 of each year (App. 62a).

Whether it is under the Commerce Clause or the Import-Export Clause that the issue arises, if the tax singles out interstate or international commerce it will be struck down. *See American Trucking Association, Inc. v. Scheiner,* 483 U.S. 266 (1987); *Maryland v. Louisiana,* 451 U.S. 724 (1981); and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue,* 483 U.S. 231 (1987). But if the tax is fairly related to the commerce or property being taxed it will be upheld. *Complete Auto; Michelin Washington Stevedoring;* and *D.H. Holmes Co., supra;* and *Trinova Corporation v. Michigan Department of Treasury,* 498 U.S. 358 (1991).

The *Trinova* decision contains perhaps the most concise statement of the role this Court has set for itself in these cases. There the Court held as follows:

> In reviewing State taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction" (cite omitted). We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax belong of right to other jurisdictions.

At 386.

If one looks at the two-fold role this Court defined for itself in *Trinova, supra,* one finds that the Court seeks first to protect against "double taxation." That is accomplished easily enough if the taxing state taxes only the portion of the property normally present within its boundaries. That would also accomplish the Court's second goal, which is to prevent the taxing state from capturing revenues which belong to another state. In the *American Trucking* case, *supra,* this Court applied a single sovereign test when reviewing the tax in question (at 282), in effect asking if the tax could be applied in such a way that state boundaries were a neutral factor in economic decision-making by those engaged in interstate commerce. Clearly, non-discriminatory taxes would meet such a test if the taxing state only taxed that portion of the property which was normally present within its boundaries. That is exactly the formula which has long been used for taxation of instrumentalities of commerce.

To hold that goods moving in commerce are immune from taxation without regard to the facts would defeat this Court's recent

decisions in favor of having interstate and international commerce pay its way. Where such goods are continuously present and continuously receiving governmental services, taxing them does not offend the purposes of the Constitution — not taxing them does.

CONCLUSION

Respondents' position in its most basic form is that the crude oil involved in this case is subject to property taxation in Texas in return for the governmental services it receives from the various political subdivisions of this state. The oil present within Respondents' boundaries on January 1 of the years in question is but part of a continuous presence of such oil owned by Petitioner. Exemption of this oil from taxation would impose on the other taxpayers of this State the burden of paying for the governmental services provided to Petitioner's property. Neither the Commerce Clause nor the Import-Export Clause of the United States Constitution were intended by the Framers to impose such a burden on this State and its taxpayers. Those provisions were instead designed to prevent Texas or any other state from imposing taxes on interstate or international commerce which do not relate fairly to the governmental services provided to such commerce.

In the instant cause none of the evils sought to be prevented by the Framers of the United States Constitution by their inclusion of the Commerce Clause and the Import-Export Clause are present. Therefore, this State and its political subdivisions have the right and duty to require Petitioner to pay its fair share of the cost of government.

The Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District pray that the Court deny Diamond Shamrock Refining and Marketing Company's Petition for Writ of Certiorari because the case

presents no issue appropriate for the Court's review and because the decision below was not in error.

Respectfully submitted,

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